

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1243X

PATRIOT WOODS RAILROAD LLC—ABANDONMENT EXEMPTION—
IN COWLITZ COUNTY, WASH.

Decided: September 29, 2017

Patriot Woods Railroad, LLC (PW) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon an approximately 21.50-mile rail line between milepost 8.5 at Ostrander Junction and the end of the line at milepost 30 in Cowlitz County, Wash. (the Line).¹ Notice of the exemption was served and published in the Federal Register on August 31, 2017 (82 Fed. Reg. 41,462). The exemption is scheduled to become effective on September 30, 2017.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) recommending that six conditions be imposed on any decision granting abandonment authority. In the EA, OEA stated that PW served a historic report on the Washington State Department of Archaeology and Historic Preservation (Washington SHPO) and requested comments. In the report, PW defined the Area of Potential Effect (APE) as the rail right-of-way and concluded that none of the rail-related structures within the APE, including the Line, are eligible for listing the National Register of Historic Places (National Register). The Washington SHPO concurred with PW's definition of the APE, but not with PW's conclusion regarding the identification of historic properties within the APE. The Washington SHPO stated that the historic report did not meet the Secretary of the Interior's Professional Qualification Standards and recommended that PW engage a cultural resources consultant to undertake an investigation of the historic significance and integrity of the Line and rail-related properties within the APE. In addition to its recommendation, the Washington SHPO requested: (a) that the Washington SHPO be consulted regarding the development of survey methodology prior to undertaking such an investigation; (b) requested information regarding consultation with potentially affected tribes and other consulting parties; and (c) requested that all documentation related to the Section 106 review of the proposed abandonment be submitted electronically. OEA states that the Washington SHPO's approach for the Section 106 review was inconsistent with both the Board's environmental rules and with the delegation authority permitting railroads to engage in initial consultation with SHPOs. OEA explained that, as the lead federal agency in the Section 106 review of the proposed abandonment, OEA remains responsible for identifying

¹ In the same jointly filed notice, Columbia & Cowlitz Railway, LLC seeks to discontinue service over the Line. Columbia & Cowlitz Ry.—Discontinuance of Serv. Exemption—in Cowlitz Cty., Wash., Docket No. AB 1244 (Sub-No. 1X).

National Register-eligible properties within the APE, in consultation with the Washington SHPO. Additional information was then provided by the Washington SHPO regarding the history of the Line proposed for abandonment and its association with the Weyerhaeuser Timber Company. After reviewing the information provided by PW, and in consultation with the Washington SHPO, OEA has determined that the Line represents a portion of the 31-mile Weyerhaeuser Woods Railroad Longview Branch, which is eligible for listing in the National Register under Criterion A. To allow sufficient time for the Washington SHPO, other interested parties, and the public to review the available information in this case and for the applicable parties to develop a Memorandum of Agreement (MOA) to resolve any adverse effects, OEA recommended a condition requiring that PW retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (APE) that are eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, has been completed. OEA also recommended that PW be required to report back to OEA regarding any consultations with the Washington SHPO, appropriate federally recognized tribes, and the public, and that PW be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

In the EA, OEA noted that the Washington Utilities and Transportation Commission (UTC) submitted comments regarding the impact of the proposed abandonment on public graded-separated railroad/road crossings. UTC recommended that the Board impose a condition requiring that PW's salvage activities cause no damage or changes to the structural integrity of these structures. To address UTC's concerns, OEA recommended that PW be required, prior to undertaking any salvage activities, to consult with UTC regarding potential impacts to public grade-separated railroad/road crossings and comply with the reasonable recommendations of UTC to prevent any damage to the structural integrity of grade-separated crossings during salvage.

OEA stated that UTC noted that several at-grade railroad/road crossings would be eliminated. OEA also stated that UTC noted that proper removal and remediation of at-grade road crossings is important to prevent an unnecessary traffic hazard for drivers in the area. Therefore, UTC recommended that the Board impose a condition requiring PW to remove and properly dispose of (a) crossing surface materials at each of the at-grade crossings and repave the roadways to closely match existing pavement; (b) all train-activated signaling equipment, including the flashing light assemblies, gates, masts, cantilevers, and bungalows; and (c) all signage within the footprint of the crossings (i.e. within one foot of the edge of the crossing surface on each approach). To address UTC's concerns, OEA recommended that, prior to undertaking any salvage activities, PW be required to consult with the UTC regarding the remediation of public at-grade railroad/road crossings and comply with the reasonable recommendations of UTC.

In the EA, OEA noted that PW was aware of two releases of hazardous substances in or near the Line: (1) an oil spill caused by derailment of an outbound train from Green Mountain log scales; and (2) groundwater contamination at Headquarters Camp shop caused by a third party who provided an independent cleanup. OEA points out that the Washington Department of Ecology (WDE) Hazardous Waste and Toxics Reduction Program advised PW of its recommended best practices and disposal requirements for treated wood, which the Line may contain. Another WDE program, the Toxics Cleanup Program, reminded PW to test any potentially contaminated media if contamination is suspected, discovered or occurs and notify WDE if contamination of soil or groundwater is apparent or revealed by such testing. To address WDE's comments, OEA recommended that PW shall (1) prior to undertaking any salvage activities, consult with WDE's Hazardous Waste and Toxics Reduction Program and shall follow the reasonable requirements of that agency regarding the removal and disposal of chemically treated wood, and (2) if contamination is suspected, discovered, or occurs during salvage activities, notify and consult with OEA and WDE's Toxics Cleanup Program to develop a plan for testing and remediation, if necessary.

OEA stated that it received comments from the Cowlitz Indian Tribe requesting that, if archaeological or historic materials are encountered during project work, PW should cease work in the immediate area, notify the Tribe and the Department of Archaeology and Historic Preservation (SHPO in Oregon), and take the following actions: (1) implement reasonable measures to protect the discovery site, including any appropriate stabilization or covering, (2) take reasonable steps to ensure the confidentiality of the discovery site, and (3) take reasonable steps to restrict access to the discovery site. Accordingly, OEA recommended that, if any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, PW shall immediately cease all work and (a) notify the appropriate law enforcement agencies (if human remains are present), (b) implement reasonable measures to protect the discovery site, including any appropriate stabilization or covering, (c) take reasonable steps to ensure the confidentiality of the discovery site, and (d) take reasonable steps to restrict access to the discovery site. PW shall then notify the Cowlitz Indian Tribe, OEA, interested federally-recognized tribes, and the SHPOs of both Washington and Oregon pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with interested federally-recognized tribes, SHPOs, PW, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary. If any human remains are determined to be Native, further consultation with the affected Tribes must take place in order to mitigate the final disposition of said remains.

OEA received comments in response to the EA by the September 20, 2017 due date. OEA issued its final EA on September 25, 2017.

In the final EA, OEA states that on September 19, 2017, OEA received comments from the Toutle Valley Community Association (TVCA). In those comments, TVCA states that Line crosses several creeks that may contain federally-protected species of fish. TVCA states that additional federally-listed species with threatened status were not included in the EA. OEA

obtained an official species list from the U.S. Fish and Wildlife Service (USFWS) prior to making its determination of no effect, and, to date, USFWS has not submitted comment in response to the EA. TVCA identified one state plant species of concern, the Western Wahoo. To address the concerns of TVCA, OEA recommends that, prior to undertaking salvage activities, PW shall consult with the Washington Department of Fish and Wildlife regarding potential impacts of the proposed abandonment to species of state concern and shall follow the reasonable recommendations of that agency during salvage activities.

Consistent with OEA's recommendations, the six environmental conditions recommended in the EA and final EA, and the new condition recommended in the final EA, will be imposed.

In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. On August 22, 2017, Cowlitz County, Washington (the County) filed a request for the issuance of a notice of interim trail use or abandonment (NITU) to negotiate with PW for acquisition of the 21.50-mile line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29.² Pursuant to 49 C.F.R. § 1152.29, the County has also submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on August 30, 2017, PW states that it agrees to negotiate with the County for interim trail use.

Because the County's request complies with the requirements of 49 C.F.R. § 1152.29 and PW is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, PW may fully abandon the Line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

The County also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. The County asks that PW be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, for a 180-day period from the effective date of the abandonment authorization. The County also asks that PW be prohibited from removing or destroying potential trail-related structures such as bridges, trestles, and tunnels. The County's justification for its request is that

² In the same filing, County requests interim trail use and public use for the 7 miles of connecting rail line Columbia & Cowlitz Railway seeks to abandon. See Columbia & Cowlitz Ry.—Aban. Exemption—in Cowlitz Cty., Wash., Docket No. AB 1244X. That request will be addressed in a separate decision.

the rail corridor has considerable value for public purposes and that the 180-day period is needed to complete a trail plan and begin negotiations with PW.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because the County has satisfied these requirements, a 180-day public use condition will be imposed, requiring PW to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from September 30, 2017, the effective date of the exemption.

When proper requests for interim trail use/rail banking and public use conditions are made, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on March 29, 2018, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until March 28, 2018. If a trail use agreement is reached for a portion of the right-of-way prior to March 28, 2018, PW must keep the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, PW is not required to deal exclusively with the County, but may engage in negotiations with other interested persons.

This decision, and the proposed abandonment if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on August 31, 2017, exempting the abandonment of the Line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit the

County to negotiate with PW for trail use for the rail line for a period of 180 days from the service date of this decision and notice, until March 28, 2018, and to permit public use negotiations as set forth below for the rail line for a period of 180 days commencing from the effective date of the exemption, until March 29, 2018. The abandonment is also subject to the conditions that PW shall:

(1)(a) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (APE) that are eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, has been completed, (b) report back to OEA regarding any consultations with the Washington SHPO, appropriate federally recognized tribes, and the public, and (c) not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition;

(2) prior to undertaking any salvage activities, consult with UTC regarding potential impacts to public grade-separated railroad/road crossings and comply with the reasonable recommendations of UTC to prevent any damage to the structural integrity of graded-separated crossings during salvage;

(3) prior to undertaking any salvage activities, consult with the UTC regarding the remediation of public at-grade railroad/road crossings and comply with the reasonable recommendations of UTC;

(4) prior to undertaking any salvage activities, consult with the WDE's Hazardous Waste and Toxics Reduction Program and follow the reasonable recommendations of that agency regarding the removal and disposal of chemically treated wood;

(5) if contamination is suspected, discovered, or occurs during salvage activities, notify and consult with OEA and the WDE's Toxics Cleanup Program to develop a plan for testing and remediation, if necessary;

(6) in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, immediately cease all work and notify OEA, the Washington SHPO, the Cowlitz Indian Tribe, and interested federally recognized tribes pursuant to 36 C.F.R. § 800.13(b) (OEA will then consult with the Washington SHPO, CLC, the Cowlitz Indiana Tribe, interested federally recognized tribes, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary). If any human remains are determined to be Native, further consultation with the affected Tribes must take place in order to mitigate the final disposition of said remains; and

(7) consult with the Washington Department of Fish and Wildlife regarding potential impacts of the proposed abandonment to species of state concern and follow the reasonable recommendations of that agency during salvage activities.

3. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, PW may discontinue service. PW shall keep intact the right-of-way for the 21.50-mile line, including potential trail-related structures on the Line such as bridges, trestles, culverts, and tunnels, for a period of 180 days, until March 29, 2018, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 4 above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by March 28, 2018, for the right-of-way, interim trail use may be implemented. If no agreement is reached, PW may fully abandon the Line, subject to any outstanding conditions.

9. This decision and notice is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.